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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10
11 TROLL BUSTERS© LLC,

12 Plaintiff,

13 v.

14 ROCHE DIAGNOSTICS GMBH, et al.,

15 Defendants.
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C.A. No. 3:11-cv-00056-IEG -WVG

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF EMD
CHEMICALS INC.'S JOINDER AND
MOTION TO DISMISS**

Date: June 13, 2011
Time: 10:30 a.m.
Ctm: 1, Fourth Floor
Judge Hon. Irma E. Gonzalez

Complaint Filed: January 10, 2011

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Amended Complaint filed by relator Troll Busters LLC (“Troll Busters”) lists in its caption more than a dozen companies, including EMD Chemicals, Inc. (“EMD Chemicals”). The body of the Amended Complaint, which contains no allegations against EMD Chemicals (but instead references a non-existing entity, EMD BioScience), purports to be a complaint for false patent marking under 35 U.S.C. § 292. As set forth below, Troll Busters’ Amended Complaint lacks a number of required factual allegations, is duplicative of an earlier-filed action against EMD Chemicals that has since been settled, and does not state a claim against EMD Chemicals, and the Court lacks personal jurisdiction over the non-existent entity EMD BioScience. Further, the false marking statute is unconstitutional. As a result, the complaint should be dismissed.

Specifically:

Troll Busters has failed to sufficiently plead its false marking allegations. As the Federal Circuit recently determined, false marking claims under 35 U.S.C. § 292 sound in fraud, as they include a requirement to prove “intent to deceive the public,” and therefore are subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b). Troll Busters’ allegations fall short of alleging the factual basis required by Rule 9(b) as applied by the Federal Circuit, and thus the complaint against EMD should be dismissed. **For this case-dispositive issue, EMD Chemicals joins in defendant Roche Molecular Systems’ (“Roche”) Motion to Dismiss, and incorporates herein the arguments set forth in Roche’s opening brief (dkt. 91 at 1-14), as the allegations made against “EMD Bioscience” are substantially identical to those made against Roche.**

The false marking statute is unconstitutional. The false marking statute, 35 U.S.C. § 292, is unconstitutional. It violates the Take Care Clause of Article II, as the United States does not have sufficient control in litigations brought pursuant to it. As a result, Troll Busters’ complaint should be dismissed. Further, this issue is presently before the Federal Circuit in *FLFMC v. Wham-O*. Therefore, in the event the Court does not grant dismissal, it should stay the proceedings pending the Federal Circuit’s decision in that case. **For this case-dispositive issue, EMD Chemicals joins in defendant Roche’s Motion to Declare the False Marking Statute**

1 **Unconstitutional, and incorporates herein the arguments set forth in Roche’s opening brief**
 2 **(dkt. 91 at 14-22).**

3 *The allegations (if any) made against EMD Chemicals and EMD Bioscience were already*
 4 *settled in an earlier filed case.* Even if the complaint contained sufficient allegations against
 5 EMD Chemicals, it would be a duplicative, second-filed action against EMD Chemicals for false
 6 patent marking under 35 U.S.C. § 292. Because this is a second-filed action brought by a plaintiff
 7 as a *qui tam* “relator” on behalf of the United States for the same subject matter as an earlier *qui*
 8 *tam* suit filed on behalf of the United States, the false marking claims must be dismissed.
 9 Dismissal is further compelled because the first-filed suit has been finally resolved and dismissed
 10 with prejudice, and the resolution has been approved by the real party in interest, the United
 11 States, thereby precluding a second suit covering the alleged false marking. **As this issue is**
 12 **unique to EMD Chemicals, the reasoning in support of this argument is set forth below.**

13 *Troll Busters fails to state any claim against EMD Chemicals.* While EMD Chemicals is
 14 listed in the caption of the Amended Complaint, it is not named anywhere in the body of the
 15 complaint. The only name provided, EMD BioScience, belongs to an entity that no longer exists.
 16 As a result, Troll Busters fails to state a claim against EMD and its complaint should be dismissed
 17 under Fed. R. Civ. P. 12(b)(6), and EMD BioScience should be dismissed under Fed. R. Civ. P.
 18 12(b)(2) because it is a non-existing entity. **As this issue is unique to EMD Chemicals, the**
 19 **reasoning supporting its argument is set forth below.**

20 **II. STATEMENT OF FACTS**

21 On January 9, 2011, plaintiff Tex Pat LLC (“Tex Pat”) filed suit against EMD Chemicals,
 22 Merck GmbH, and others for alleged violation of the false marking statute, 35 U.S.C. § 292. *See*
 23 Declaration of Geoffrey A. Zelley (“Zelley Decl.”) at Ex. A. In its Complaint, Tex Pat alleged
 24 that EMD Chemicals marked products (as well as packaging, catalogs, and advertisements) with
 25 expired patent numbers. *Id.* at Ex. A, ¶ 10 *et seq.* Tex Pat’s original Complaint sought redress for
 26 all of EMD Chemicals’ alleged false marking, and listed a number of patents and products, “by
 27 example only,” that detailed the alleged false marking. *Id.* at Ex. A, ¶ 10. Tex Pat subsequently
 28 filed an Amended Complaint, which expanded the list of “by example only” products and patents

1 to include additional products and patents, including those products and patents named in the Troll
 2 Busters complaint. *Id.* at Ex. B. EMD Chemicals and Tex Pat entered into a settlement agreement
 3 that resolved the *Tex Pat* litigation; that agreement settled the allegations set forth in Tex Pat's
 4 Amended Complaint, which included false patent marking activities with regard to the patents and
 5 products that are included in Troll Busters' complaint. *See* Zelley Decl. at ¶ 5 and Ex. C.
 6 Pursuant to that settlement agreement, EMD paid a fine, half of which went to the United States
 7 while the other half went to Tex Pat. *Id.* The settlement agreement was sent to the United States
 8 for review, and the United States accepted the settlement payment. Zelley Decl. at *Id.* On March
 9 15, 2011, the Tex Pat litigation was dismissed with prejudice in light of the settlement. Zelley
 10 Decl. at Ex. D.

11 On January 10, 2011, Troll Busters filed its original complaint in the instant case. (Dkt.
 12 No. 1.) The caption of that original Complaint listed EMD Chemicals, although none of the
 13 allegations contained in the complaint are directed toward EMD Chemicals. Instead, certain
 14 factual allegations referred to "EMD BioScience," and asserted that EMD BioScience falsely
 15 marked product with expired patent numbers in violation of 35 U.S.C. § 292. On April 8, 2011,
 16 after seeking leave from the Court, Troll Busters filed its First Amended Complaint (Dkt. 84).
 17 The First Amended Complaint still only listed EMD Chemicals in the caption, while making
 18 largely the same allegations against EMD BioScience in the body of the complaint. EMD
 19 BioScience is not the name of an existing entity. Declaration of Stephen J. Kunst.

20 **III. ARGUMENT**

21 **A. Troll Busters' Complaint Is Insufficient Under Fed. R. Civ. P. 9(b)**

22 Troll Busters' complaint fails to meet the requirements of Fed. R. Civ. P. 9(b) and
 23 12(b)(6), as it does not sufficiently allege false marking, and further does not allege specific facts
 24 from which one could infer an intent to deceive the public, as required by the Federal Circuit in *In*
 25 *re BP Lubricants USA Inc.*, No. 960, 2011 WL 873147 (Fed. Cir. Mar. 15, 2011). Because the
 26 allegations made against EMD Bioscience (or any other EMD entity) are substantially identical to
 27 those made against Roche, rather than reiterate the points adequately and convincingly made by
 28 Roche in its memorandum of points and authorities in support of its motion to dismiss (dkt. 91 at

1-14), EMD Chemicals instead joins in Roche's motion and incorporates Roche's motion and memorandum of points and authorities by reference as if fully set forth herein.

B. The Court Lacks Subject Matter Jurisdiction Under Rule 12(b)(1) as the False Marking Statute is Unconstitutional Because it Violates the Take Care Clause of Article II

The false marking statute is unconstitutional, as it lacks sufficient government controls to conform with the requirements of the Take Care Clause of Article II. Rather than reiterate the points adequately and convincingly made by Roche in its memorandum of points and authorities in support of its motion to dismiss (dkt. 91 at 14-22), EMD Chemicals instead joins in Roche's motion and incorporates Roche's motion and memorandum of points and authorities by reference as if fully set forth herein.

C. The Court Should Dismiss Troll Busters' Complaint Based on an Earlier-Filed and Already Settled Case

1. The Filing of a First *Qui Tam* Action Precludes the Filing of Subsequent *Qui Tam* Actions Based on the Same Conduct

In *qui tam* actions, because the relator brings its case on behalf of the United States, a first-filed suit precludes the subsequent filing of a second-filed suit on the same subject matter. This first-to-file rule applies to false patent marking law suits as well as all other *qui tam* suits. As one recent false marking case held:

[T]he false marking statute . . . contemplates only a single action brought by a private individual on behalf of the United States. Just as the United States could not bring multiple identical actions against a defendant under the false marking statute, multiple private plaintiffs cannot do so on the government's behalf.

Simonian v. Quigley Corp., No. 10 C 1259, 2010 WL 2837180, at *2 (N.D. Ill. July 19, 2010). The court in *Quigley* dismissed a second-filed false marking complaint in view of a similar complaint that was filed by a different relator several hours earlier. The court concluded: "Since Simonian's action here is identical to an earlier-filed action against the same defendant, the Court concludes that Simonian lacks standing. Defendant's motion to dismiss is granted." *Id.*

In another recent case, Judge Fogel of the Northern District of California similarly dismissed a second-filed false patent marking claim in view of an earlier-filed action on the same subject matter. The court held:

1 Having examined both complaints, the Court concludes the claims asserted by
 2 Plaintiff against Exergen are within the scope of those alleged by Brinkmeier in her
 3 earlier-filed action. For this reason, it appears that even assuming standing
 generally, the claims of the United States government previously were assigned to
 Brinkmeier depriving Plaintiff of standing to assert them here.

4 *San Francisco Tech., Inc. v. Glad Prods. Co.*, No. 10-966, 2010 WL 2943537, at *4 (N.D. Cal. July
 5 26, 2010).

6 Courts universally hold that a first-to-file bar accompanies *qui tam* statutes, thereby
 7 negating any potential standing of a second-filed relator. As one court explained: “The first-to-
 8 file bar . . . functions both to eliminate parasitic plaintiffs who piggyback off the claims of a prior
 9 relator, and to encourage legitimate relators to file quickly by protecting the spoils of the first to
 10 bring a claim.” *In re Natural Gas Royalties Qui Tam Litig. (CO2 Appeals)*, 566 F.3d 956, 961
 11 (10th Cir. 2009). In *Wisconsin v. Amgen, Inc.*, 516 F.3d 530 (7th Cir. 2008), the court stated:
 12 “Those are *qui tam* actions, in which the plaintiff (called a ‘relator’) is seeking a reward for
 13 obtaining a money judgment in the government’s favor. Congress didn’t want these bounty
 14 hunters piling into the first-filed suit and fighting over the division of the spoils, or, to the same
 15 end, bringing separate such suits.” *Amgen*, 516 F.3d at 532. Allowing multiple *qui tam* actions
 16 for the same false marking would be inconsistent with Congress’s intent in authorizing a *qui tam*
 17 action because the incentive to police against false marking would be diminished, as the Ninth
 18 Circuit noted in the context of the False Claims Act (a *qui tam* statute): “[M]ultiple relators would
 19 expect a recovery for the same conduct, thereby decreasing the total amount each relator would
 20 potentially receive and incentives to bring the suit.” *United States ex rel. Lujan v. Hughes Aircraft*
 21 *Co.*, 243 F.3d 1181, 1189 (9th Cir. 2001).

22 *Qui tam* suits under the Federal Claims Act are directly analogous to *qui tam* suits under
 23 the false patent marking statute. While the current version of the False Claims Act (amended in
 24 1986) sets forth an explicit first-to-file bar (31 U.S.C. § 3730(b)(5)), the earlier version of the
 25 statute did not, yet the earlier, silent version was consistently construed as having a first-to-file
 26 bar. *Quigley*, 2010 WL 2837180, at *2. Indeed, the earlier version of the False Claims Act had
 27 language that was very similar to the language of the false patent marking statute:
 28

<i>Pre-1943 False Claims Act (Informers Act)</i>	<i>False Patent Marking Statute</i>
<p>“[An action] may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person The person bringing the suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as of damages recovered and collected, and the other one-half shall belong to and be paid over to the United States”</p> <p>31 U.S.C. §§ 232, 234; cited in <i>U.S. v. B.F. Goodrich Co.</i>, 41 F. Supp. 574, 575 (S.D.N.Y. 1941).</p>	<p>“Any person may sue for the penalty, in which event one-half shall go to the person suing and the other to the use of the United States.”</p> <p>35 U.S.C. § 292(b).</p>

This statutory *qui tam* language was held to embody a first-to-file bar. In *B.F. Goodrich*, the court was confronted with multiple similar actions brought against the same defendant under the earlier version of the False Claims Act. *B.F. Goodrich*, 41 F. Supp. at 575. The court found that “[o]bviously, under the general rule well known and so long adhered to, one plaintiff should not be permitted to bring and maintain at the same time more than one action for the same relief.” *Id.* The court found that statute provided for “but one action and one division” of any proceeds, and that “[t]he first plaintiff has sole control of the action” and “second or subsequent attempts by others can have no standing.” *Id.* Other courts similarly held, under the old version of the False Claims Act, that a second action was precluded due to the *qui tam* nature of the action. See *Beadleston v. Sprague*, 6 Johns. 101 (N.Y. 1810) (“The person who first commences a *qui tam*, or popular action, attaches a right in himself, which no other common informer, by a subsequent suit, can divest; and he may demur to a plea of a recovery in such subsequent suit.”); *United States v. Anaconda Wire & Cable Co.*, 52 F. Supp. 824, 826 (E.D. Pa. 1943) (“Assuming the identity of the actions, it is not open to question, that the Government having first commenced an action to recover for the alleged wrongs, another action at the instance of an informer will not lie.”) (quoting III Blackstone’s Commentaries, at 162, and citing *B.F. Goodrich* with approval); *U.S. ex rel. Benjamin v. Hendrick*, 52 F. Supp. 60, 61 (S.D.N.Y. 1943) (same); *U.S. v. Griswold*, 26 F. Cas. 42, 44 (D. Or. 1877) (“whichever—the informer or the district attorney—first commences an

1 action for a particular violation of the statute, thereby excludes the other from so doing.”); *Pub.*
 2 *Interest Bounty Hunters v. Bd. of Governors of Fed. Reserve Sys.*, 548 F. Supp. 157, 162 (N.D.
 3 Ga. 1982) (“[F]or any one claim based on any one set of facts, only one *qui tam* action can be
 4 brought by a private informer ‘in the name of the United States.’”) (citing *B.F. Goodrich*, 41 F.
 5 Supp. at 575).

6 The *Quigley* and *San Francisco Technology* courts agreed with the reasoning of these
 7 cases, and held that the false patent marking statute has an implicit first-to-file bar. See *Quigley*,
 8 2010 WL 2837180, at *2 (“[T]his Court agrees with the reasoning in [*B.F. Goodrich*]. As in the
 9 False Claims Act, the false marking statute contains no provision allowing for multiple private
 10 plaintiffs to share in a recovery. Rather, it contemplates only a single action brought by a private
 11 individual on behalf of the United States. Just as the United States could not bring multiple
 12 identical actions against a defendant under the false marking statute, multiple private plaintiffs
 13 cannot do so on the government’s behalf.”).

14 The language and the legislative history of the false patent marking statute further indicate
 15 that the statute was meant to embody a first-to-file bar. The legislative history of 35 U.S.C. § 292
 16 refers to the statute as “an informer action.” See H.R. Comm. Report (May 12, 1952) at 31 (“The
 17 informer action is included as additional to an ordinary criminal action”). As indicated above,
 18 “informer actions” (i.e., *qui tam* actions) have always embodied a first-to-file bar. See, e.g.,
 19 *Anaconda Wire*, 52 F. Supp. at 826 (“another action at the instance of an informer will not lie”).
 20 Thus, in enacting the current version of the false marking statute in 1952, Congress meant the
 21 statute to be an “informer action,” which always embodies a first-to-file bar.

22 The statute’s express language further indicates that only a single (first-filed) action may
 23 lie. The plain language of 35 U.S.C. § 292 provides for a single *qui tam* recovery by a single
 24 plaintiff on behalf of the government: “Any person may sue for *the* penalty, in which event one-
 25 half shall go to *the* person suing and the other to the use of the United States.” 35 U.S.C. § 292(b)
 26 (emphasis added). The statute plainly provides for one penalty—“the penalty”—not multiple and
 27 repeated penalties. Section 292(b) uses the definite article “the” instead of the indefinite article
 28 “a” in referring to the penalty, indicating that there is to be a single recovery. Courts interpret the

definite article “the” to be limiting and singular in number. *See, e.g., Am. Bus Ass’n v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000) (“[I]t is a rule of law well established that the definite article ‘the’ particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of ‘a’ or ‘an.’”); *S.E.C. v. KPMG LLP*, 412 F. Supp. 2d 349, 387-88 (S.D.N.Y. 2006) (“A statutory provision’s use of the definite article ‘the,’ as opposed to the indefinite ‘a,’ ‘an,’ or ‘any,’ indicates that Congress intended the term modified to have a singular referent.”). Therefore, in using the definite article “the,” Congress intended for a *qui tam* plaintiff bringing a false marking claim under 35 U.S.C. § 292 to be limited to *one* award, i.e., “*the* penalty,” in *one* *qui tam* action, not repeated penalties or actions for the same mismarking. Similarly, the definite article “the” also precedes the word “person” in Section 292(b), again indicating Congress’s intent to authorize a single *qui tam* relator on behalf of the government for a single act of false marking. *See* 35 U.S.C. § 292(b); *see also Anderson v. Jensen Racing, Inc.*, 324 Or. 570, 578-79 (1997) (noting the definite article “the” functions as an adjective that denotes a particular and specified thing). Because Congress used the limiting and singular definite article “the” instead of an open-ended indefinite article, Congress intended for a single recovery by a single *qui tam* plaintiff.

Finally, construing the false marking statute to allow multiple suits for the same conduct would violate the Double Jeopardy Clause of the United States Constitution. Section 292 is a criminal statute. *Pequignot v. Solo Cup Co.*, 608 F.3d 1356, 1363 (Fed. Cir. 2010) (“the false marking statute is a criminal one”).¹ The Fifth Amendment to the Constitution prohibits the imposition of criminal liability twice upon a person; specifically, Double Jeopardy precludes multiple punishments, including monetary penalties, for the same criminal offense. *Dept. of*

¹ In addition, the legislative history, in two locations, unequivocally identifies § 292 as being a “criminal” statute:

1) “Section 292 is a criminal statute relating to falsely marking an article as being patented when it was not [T]his section ... makes it an ordinary criminal action as well as an informer action as in the present statute.” S. Rep. No. 1979, 82 Cong., 2d. Sess. (1952), reprinted in, 1952 U.S.C.C.A.N. 2394, 2403; and
 2) “This is a criminal provision. ... The informer action is included as additional to an ordinary criminal action.” *Id.* at 2424.

1 *Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 769 n.1 (1994) (“The Double Jeopardy Clause
 2 protects against a second prosecution for the same offense after acquittal, a second prosecution for
 3 the same offense after conviction, and multiple punishments for the same offense. Although its
 4 text mentions only harms to ‘life or limb,’ it is well settled that the Amendment covers
 5 imprisonment and monetary penalties.”). Because statutes should be construed to preserve their
 6 constitutionality, *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780
 7 (1981), the false marking statute should be construed to preclude subsequent criminal liability for
 8 the same subject matter.

9 Accordingly, the false marking statute, like all *qui tam* statutes, carries with it a prohibition
 10 against second-filed suits on the same subject matter.

11 **2. Troll Busters’ Claims Against EMD Are Duplicative Of Claims Already**
 12 **Raised In The *Tex Pat Qui Tam* Action, And Should Be Dismissed Under**
 13 **The “First-to-File Rule”**

14 **a. The *Tex Pat Qui Tam* Action (E.D. Texas) Was Filed Before Troll**
 15 **Busters *Qui Tam* Complaint Was Filed**

16 Tex Pat sued EMD Chemicals (and “EMD BioSciences, Inc.”) in the Eastern District of
 17 Texas for false marking prior to the filing of Troll Busters’ instant lawsuit. Tex Pat’s original
 18 complaint was filed on January 9, 2011, and its amended complaint was filed on March 7, 2011.
 19 *See Zelley Decl. Exs. A and B.* The first-filed *Tex Pat* complaint alleged that EMD Chemicals
 20 falsely marked products with expired patent numbers, much as Troll Busters’ complaint does.
 21 *Zelley Decl. Ex. A at ¶¶ 10-69.* The complaint further broadly alleged additional markings not
 22 identified by product or patent names or numbers, specifically alleging the following:

23 EMD [Chemicals] has and/or continues . . . to mark upon, affix to, and/or use
 24 in advertising patents, including, by way of example only, U.S. Patent Nos. [listing
 25 patents] . . . in connection with Defendant’s products and/or related product
 26 packaging and advertisements, including, by way of example only, various of its
 27 chemical products, as illustrated in Exhibit Q.

28 *Id.* at Ex. A, at ¶ 10.

The amended complaint filed in *Tex Pat* similarly included a broad allegation against all of
 EMD’s alleged false patent markings (*Zelley Decl. Ex. B at ¶¶ 10 et. seq.*), and further specifically
 listed the specific patents and products that were accused in Troll Busters’ complaint (*id.*)

Troll Busters may try to argue that the fact that Tex Pat’s amended complaint was filed after Troll Busters’ original complaint justifies departing from the first-to-file rule. This argument fails. The date for purposes of the first-to-file rule is the date when the case is filed, not when an amended complaint is filed. *See Ivy Dry, Inc. v. Zanzfel Labs., Inc.*, No. 08-4942 (WHW), 2009 WL 1851028, at *5 (D.N.J. June 24, 2009) (transferring to Michigan a case that was filed two months after the first-filed case but eight months before the amended complaint was filed, noting that “[t]here is no question that the Michigan Action was filed first.”). The *Tex Pat* case was filed on January 9, 2011, and that complaint broadly alleged that “EMD has and/or continues...to mark upon, affix to, and/or use in advertising, including, by way of example only, [Listed Patents]...in connection with Defendant’s products and/or related product packaging and advertisements, including, by way of example only, various of its [Product Category]....” Zelley Decl. Ex. A at ¶ 10. This type of broad language, which on its face does not limit the complaint to particular products or patents, has been held to encompass product-specific claims of false patent marking in a second filed complaint. In *Simonian v. Irwin Industrial Tool Co.*, No. 10-1260, 2011 WL 147717 (N.D. Ill. Jan. 18, 2011), the court rejected the second-filed relator’s argument that the first-filed complaint “did not call out that specific product.” *Id.* at *5 (“Mr. Simonian takes too cramped a view of the [first-filed] complaint, which identified the Edger as an ‘example’ of the products that NOC improperly marked with the ‘148 patent—not as the only product challenged.”). Thus, even though Tex Pat’s amended complaint was filed after Troll Busters’ original complaint, it is the date the complaint was originally filed that should control, and Tex Pat filed first. Moreover, *both* the *original* and *amended* complaint in *Tex Pat* were filed before the Amended Complaint filed in this case by Troll Busters; thus, both were filed prior to the time that Troll Busters’ concededly deficient original complaint was replaced by its Amended Complaint (which is also faulty, although Troll Busters has not conceded this).

b. The *Tex Pat Qui Tam* Action Was Filed on Behalf of the Same Entity—the United States

It is worth emphasizing that Tex Pat, and then Troll Busters, filed their false marking cases (as they had to) on behalf of the same entity—the United States. “[*Q*ui tam actions reward

private parties for successfully bringing suit on behalf of the government.” *SKF USA, Inc. v. U.S. Customs and Border Prot.*, 556 F.3d 1337, 1356 (Fed. Cir. 2009). The *qui tam* laws permit private citizens to file enforcement actions on behalf of the government, in return for a bounty. *Quigley*, 2010 WL 2837180, at *1 (citing *U.S. ex rel. Hall v. Tribal Dev. Corp.*, 49 F.3d 1208, 1212 (7th Cir. 1995)). “By permitting members of the public to sue on behalf of the government [under 35 U.S.C. § 292], Congress allowed individuals to help control false marking.” *Forest Group, Inc. v. Bon Tool Co.*, 590 F.3d 1295, 1303-04 (Fed. Cir. 2009). Although a private citizen can sue on behalf of the government, it is the government’s claim to bring. See *Shizzle Pop, LLC v. Wham-O, Inc.*, No. CV 10-3491 PA (FFMx), 2010 WL 3063066, at *1 (C.D. Cal. Aug. 2, 2010) (recognizing that the real party in interest in both cases is the United States, but refusing to apply first-to-file rule because different patents were alleged in the different actions).

Like Troll Busters’ claims against EMD BioScience, the *qui tam* false marking action in the Eastern District of Texas was brought by a private citizen on behalf of the U.S. government. Because the real party in interest in the *qui tam* action in the Eastern District of Texas is identical to the real party in interest in the instant litigation, there can be no complaint by Troll Busters that the conduct that it alleged is not being redressed by the *Tex Pat* case.

Accordingly, dismissal of Troll Busters’ claims against EMD BioScience (or EMD Chemicals, if the Amended Complaint can be construed to state a claim against it)—sounding in false patent marking but following *Tex Pat*’s complaint on the same subject matter—is compelled. Troll Busters, as the filer of a second *qui tam* suit on the same subject matter as the first *qui tam* suit, lacks standing to sue.

3. Troll Busters’ Claims Against “EMD Bioscience” Are Further Barred Due To Release Of The Claims

When a party resolves its liability to the United States through a settlement agreement made with a *qui tam* relator acting on the United States’ behalf, a subsequent *qui tam* relator acting on the United States’ behalf cannot seek additional remedies against that party. In a very recent false patent marking case, a court examined a similar situation and held that a settlement

1 agreement, containing a release, precluded a second-filing party from maintaining its false
2 marking lawsuit:

3 Having received money from [defendant] Newell in exchange for broad releases of
4 any claims of improper marking by [related defendant] NOC or of NOC products
5 with the '148 Patent, the United States has relinquished any right to damages from
6 NOC in another lawsuit alleging improper marking with the same expired patent.
7 Since [second-filed relator] Mr. Simonian sues under Section 292 as the assignee of
the United States, *Stauffer v. Brooks Bros.*, 619 F.3d 1321, 1325 (Fed. Cir. 2010),
Mr. Simonian has no greater rights than would the United States to pursue an
improper marking claim.

8 *Simonian v. Irwin Indus. Tool Co.*, No. 10-1260, 2011 WL 147717, at *4 (N.D. Ill. Jan. 18, 2011).

9 The court concluded that the release provisions in the settlement agreements with the original *qui*
10 *tam* relators “extinguish any Section 292 claims against [defendant] NOC for products marked
11 with the '148 patent.” *Id.* at *6. Further, at least one court has recently held that a settlement
12 reached with a *second-filed* false marking plaintiff acts to preclude the progression of a first-filed
13 complaint for false marking. *San Francisco Tech., Inc. v. Aero Prods. Int'l, Inc.*, Case No. 5:10-
14 cv-02994-JF (N.D. Cal. Mar. 14, 2011). That court reasoned that “the United States has
15 relinquished its right to seek damages from [Defendant] for alleged false markings with the
16 patents-in-suit.” *Id.* at 2.

17 Thus, not only does a second-filing relator lack standing to sue a party (*see* Section III.C.1
18 & 2, *supra*), but when that party has resolved its liability with the first-filing relator, the settlement
19 and release additionally protects the party from claims by a second-filing relator. Even where it is
20 the second filed suit that is subject to settlement, that settlement precludes the first filed relator
21 from putting forth a claim for false marking. The settlement operates as a release.² A court may
22 dismiss a cause of action pursuant to Federal Rule of Civil Procedure 12(b)(6) where a contractual
23

24 ² It is appropriate for the Court to address the release provisions of a settlement agreement in the
25 context of a motion to dismiss. *See Willis Corroon Corp. of Utah, Inc. v. United Capitol Ins. Co.*,
26 No. 97-2208 MHP, 1998 WL 30069, at *3 (N.D. Cal. Jan. 5, 1998) (“[W]hile the interim settlement
27 agreement may not be ‘central’ to the substantive issues in Corroon’s complaint, it clearly is central
28 to Corroon’s ability to bring this action since the agreement is a binding contract which allegedly
limits the parties’ right to sue. The agreement is therefore centrally relevant—and potentially
dispositive—in the same way that facts indicating the existence of a statute of limitations or res
judicata defense would be.”).

1 release precludes the defendant's liability. *See, e.g., Jacobs v. Venali, Inc.*, 596 F. Supp. 2d 906
 2 (D. Md. 2009) (dismissing complaint due to both a release and res judicata). In this case, EMD
 3 and the U.S. government—the real party in interest—have released the U.S. government's false
 4 marking claims.

5 **a. The Settlement Agreement Between EMD Chemicals and the**
 6 **Original *Qui Tam* Relator (on Behalf of the United States)**
 7 **Released EMD's Liability**

8 The settlement entered into between EMD Chemicals and relator Tex Pat (acting on behalf
 9 of the U.S. government) resolved a bona fide dispute filed by Tex Pat. *See* Zelley Decl. ¶¶ 3, 4
 10 and Exs. A, B (Tex Pat complaint; Tex Pat amended complaint). EMD Chemicals timely made
 11 its payments pursuant to the settlement agreement. *Id.* at ¶ 5 and Ex. C. The United States, when
 12 given the chance, did not challenge the settlement agreement entered on its behalf. And, as a
 13 result, the court granted dismissal with prejudice of Tex Pat's second complaint, which contained
 14 all of the patents and products named in Troll Busters' complaint. Therefore, EMD Chemicals'
 15 liability for those patents and products has been released.

16 **4. Troll Busters' Claims Against EMD BioScience (or EMD Chemicals)**
 17 **Should Also Be Dismissed Under the Doctrine of Res Judicata**

18 Res judicata, also known as claim preclusion, "precludes the parties from relitigating
 19 issues that were or could have been raised in [a prior] action." *Bronson v. Green Tree Servicing,*
 20 *LLC*, No. 2:03-cv-1611 JAM RRB, 2009 WL 546159, at *4 (E.D. Cal. March 4, 2009), *citing*
 21 *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). Res judicata can serve as the
 22 basis for the grant of a motion to dismiss. *Id.* (*citing Stewart v. U.S. Bancorp.*, 297 F.3d 953, 956
 23 (9th Cir. 2002)). "The judgment prevents litigation of all grounds and defenses that were or could
 24 have been raised in the action." *Id.* (*citing Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1518
 25 (9th Cir. 1985)). Res judicata prohibits future lawsuits when there is "(1) an identity of claims;
 26 (2) a final judgment on the merits, and (3) identity or privity between parties." *Id.*

27 The *Tex Pat* false marking action in the Eastern District of Texas, brought on behalf of the
 28 U.S. government by Tex Pat as a *qui tam* plaintiff, bars Troll Busters' Complaint against EMD
 BioScience (or EMD Chemicals) under the doctrine of res judicata.

a. The Issues and Real Parties in Interest in the *Tex Pat* Action and the Instant Litigation are Identical

As explained above, the real plaintiff in interest in the *Tex Pat* false marking action is the U.S. government. *See* § III.C.2.b., *supra*. The *Tex Pat* false marking action was brought by a private citizen on behalf of the U.S. government, as were Troll Busters' claims against EMD BioScience (or EMD Chemicals). In addition, as explained above, the issues in both the first-filed *Tex Pat* case and the instant case are identical. *See* § III.C.2.a, *supra*. Thus, the "identity" factors of the claim preclusion test are satisfied.

b. There Was a Final Judgment on the Merits in the *Tex Pat* Action

The doctrine of res judicata bars "all grounds for recovery which could have been asserted, whether they were or not, in a prior suit between the same parties . . . on the same cause of action, if the prior suit concluded in a final judgment on the merits." *Sexton v. Chino Valley Indep. Fire Dist.*, 7 Fed. Appx. 660, 662-63 (Fed. Cir. 2001) ("By his settlement of all claims in his first lawsuit, which was entered as a judgment in that case, Sexton is precluded from asserting claims that he alleged or could have alleged in his prior lawsuit.") (*citing Ross v. Int'l Bhd. of Elec. Workers*, 634 F.2d 453, 457 (9th Cir. 1980)). A resolution based on a settlement is considered a final judgment on the merits. *See Rein v. Providian Fin. Corp.*, 270 F.3d 895, 903 (9th Cir. 2001) (holding that the settlement and dismissal of the trustee's usury claim against lienholder operates as res judicata to bar appellant from raising an usury claim on behalf of the estate against the same lienholder) (*citing In re Dominelli*, 820 F.2d 313, 316-17 (9th Cir. 1987)); *In re Stone*, 107 F.3d 17 (Table) (9th Cir. 1997) ("Generally, '[f]or res judicata purposes, an agreed or stipulated judgment is a judgment on the merits.'" (citation omitted); *Green v. Ancora-Citronelle Corp.*, 577 F.2d 1380, 1383-84 (9th Cir. 1978) (holding stipulation of settlement by parties in state court constituted final judgment on the merits for collateral estoppel purposes).

EMD Chemicals and the U.S. government (by way of the private party suing on its behalf) have already finally resolved the *Tex Pat* Eastern District of Texas *qui tam* action (Zelley Decl. Ex. D), and the complaint has been dismissed with prejudice (*id.*) Consequently, there has been a final judgment on the merits.

For the foregoing reasons, the resolution and dismissal of the *Tex Pat* false marking action bars Troll Busters' claims against EMD BioScience (and EMC Chemicals, if such a claim has been made) under the doctrine of res judicata.

D. Troll Busters' Complaint Should be Dismissed for Lack of Personal Jurisdiction and Failure to State a Claim Because EMD BioScience, the Entity Against Whom the Allegations Are Made, Is Not an Entity

While EMD Chemicals is listed in the caption of the complaint, its name appears nowhere in the body of the complaint. As a result, there is no claim actually made against EMD Chemicals, and no allegations (general or specific) are made against EMD Chemicals. The person against whom the allegations are made is "EMD BioScience," but such a name does not exist as a legally recognized entity. Therefore, the claims against EMD BioScience should be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, and to the extent EMC Chemicals can be considered a defendant (which it cannot; the only mention of EMD Chemicals is in the caption), it should be dismissed for utterly failing to state a claim—no allegations whatsoever are made against it.

1. Troll Busters' Complaint Fails to Allege Any Accusations or Facts Against EMD Chemicals

Fed. R. Civ. P. 12(b)(6) allows for dismissal where a complaint fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A complaint may be dismissed as a matter of law if it lacks a cognizable legal theory or states insufficient facts under a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint for additional facts. *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). When considering a motion to dismiss, a court must accept as true all "well-pleaded factual allegations." *Ashcraft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009). "In sum, for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

1 A defendant listed in the caption of Troll Busters' complaint is EMD Chemicals.
 2 However, the body of the complaint contains *no* factual allegations that pertain to EMD
 3 Chemicals. As a result, even if all of the facts are accepted as true, there are no factual allegations
 4 that are tied to conduct of EMD Chemicals, and any claim made against EMD Chemicals should
 5 be dismissed for failure to state a claim.

6 **2. EMD BioScience is Not an Entity Capable of Being Sued**

7 The body of the Amended Complaint refers to EMD BioScience, and it is EMD
 8 BioScience against whom Troll Busters makes its allegations. *See* Amended Complaint ¶¶ 1, 34-
 9 35, 90-91, 156-159. However, EMD BioScience is not a legally recognized entity capable of
 10 being sued. While a company that went by that name used to exist, it has since been dissolved.
 11 Declaration of Stephen J. Kunst at ¶ 2. Thus, EMD BioScience not being a legal entity, it is not
 12 capable of being sued and should be dismissed. *See, e.g., Hussein v. Miller*, 232 F. Supp. 2d 653,
 13 656 (E.D. Va. 2002) (dismissing all claims against non-existent entity); *Broadway v. adidas*
 14 *America, Inc.*, 2008 WL 2705566, *5 (E.D. Ark. July 10, 2008) ("Accordingly, there being no
 15 such entity as adidas, Inc., plaintiffs' amended complaint against adidas, Inc. must be
 16 dismissed."); *Straker v. Metropolitan Transit Auth.*, 333 F. Supp. 2d 91, 94 (E.D.N.Y. 2004)
 17 (dismissing "Metropolitan Transit Authority" because no such entity existed).

18 The dismissal of EMD BioScience due to its non-entity status is a matter of lack of
 19 personal jurisdiction, among other things. When a defendant moves to dismiss for lack of
 20 personal jurisdiction under Rule 12(b)(2), "the plaintiff bears the burden of demonstrating that
 21 jurisdiction is appropriate." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th
 22 Cir. 2004). Thus, the lack of the Court's personal jurisdiction over EMD BioScience now having
 23 been established, Troll Busters must now come forward and demonstrate otherwise.

24 **IV. CONCLUSION**

25 For the reasons stated above, Troll Busters' Complaint against should be dismissed as to
 26 EMD Chemicals and EMD BioScience, without leave to file an amended complaint.
 27
 28

Respectfully submitted,

Dated: May 9, 2011

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